Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

KENNETH D. SANDSTAD,

Petitioner,

v.

CB RICHARDS ELLIS, INC.

Defendant.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is "direct evidence" evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic, and if not, does "direct evidence" require a confession?

2. When the Court used the term "disinterested witnesses" in *Reeves v. Sanderson Plumbing Products*, Inc., 530 U.S. 133, 147 L.Ed.2d 105, 151 (2000) did it mean that a disinterested witness is someone other than an interested witness and that an interested witness includes managers or agents involved in the employment decision?

3. In considering whether to grant judgment as a matter of law under Fed. R. Civ. P. 56, in indirect discrimination cases, may the district court determine the credibility of an employer's explanation of the discharge as held by the Seventh Circuit in 1994 and the Fifth Circuit in 2002, or is such determination prohibited by this Court in Reeves in 2000?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below: To Petitioner's knowledge CB Richard Ellis, Inc. has no parent companies or nonwholly owned subsidiaries.

Kenneth D. Sandstad	Plaintiff/Petitioner
Hal K. Gillespie	Attorney for Plaintiff-Petitioner
CB Richard Ellis, Inc.	Defendant/Respondent
Bryan C. Collins	Attorney for Defendant/Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature of the Case and Proceedings Below	2
B. Factual Background	2
REASONS FOR GRANTING THE WRIT	7
I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION	8
II. THE COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND DEPARTURE FROM THIS COURT'S HOLDING IN *REEVES*	15

TABLE OF CONTENTS—Continued

Page

A. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that Managers or Agents Involved in the Employment Decision are not Interested Witnesses Creates a Split in the Circuits and a Departure from this Court's Holding in *Reeves* 17

B. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that in Indirect Discrimination Cases, the District Court May Determine the Credibility of an Employer's Explanation of the Discharge Creates a Split in the Circuits and is Contrary to this Court's Holding in *Reeves*. 21

CONCLUSION 22

APPENDICES 1a

TABLE OF AUTHORITIES

CASES Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 15
Armour v. The County of Beaver, Penn., 271 F.3d 417 (3d Cir. 2001) 16
Brown v. East Mississippi Elec. Pwr. Ass'n, 989 F.2d 858 (5th Cir. 1993) 12
Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) 8, 10
Equal Employment Opportunity Commission v. Board of Regents of the Univ. of Wisconsin System, 288 F.3d 296 (7th Cir. 2002) 16
Fester v. Farmer Bros. Co., 49 Fed. Appx. 785 (10th Cir. 2002) 16
Futrell v. J.I. Case, 38 F.3d 342 (7th Cir. 1994) 21, 22
Haun v. Ideal Industries, Inc., 81 F.3d 541 (5th Cir. 1996) 12
Malacara v. City of Madison, 224 F.3d 727 (7th Cir. 2000) 16
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) 9, 10
Mickle v. Morin, 297 F.3d 114 (2d Cir. 2002) 16
Perfetti v. First National Bank of Chicago, 950 F.2d 449 (7th Cir. 1991), cert. denied, 505 U.S. 1205 (1992) 21
Portis v. First Nat'l Bank of New Albany, 34 F.3d 325 (5th Cir. 1994) 12
Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed.2d 268 (1989) 7, 9-12
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L.Ed2d 105, 120 S.Ct. 2097 (2000) ..... *passim*
Sandstad v. CB Richard Ellis, Inc., 309 F.2d 893 (5th Cir. 2002) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001).... 16
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207 (1981)..... 9
Traylor v. Brown, 295 F.3d 783 (7th Cir. 2002).. 16, 19-20
Vaughn v. Texaco, Inc., 918 F.2d 517 (5th Cir. 1990)..... 12
Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002) ... 16
White v. Burlington Northern & Santa Fe Rwy. Co., 310 F.3d 443 (6th Cir. 2002)..... 16
Wilcox v. State Farm Mutual Automobile Ins. Co., 253 F.3d 1069 (8th Cir. 2001) 16
Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276 (9th Cir. 2001) 16
Wright v. Southland Corporation, 187 F.3d 1287 (11th Cir. 1999).....8, 10, 11, 14

STATUTES

28 U.S.C. § 1254(1)..... 2
28 U.S.C. § 1331..... 2
29 U.S.C. § 623(a)..... 2
29 U.S.C. § 626(c)..... 2
29 U.S.C. § 630(b)..... 17

RULES

Supreme Court Rule 13.1..... 2
Fed. R. Civ. P. 56..... i

MISCELLANEOUS

Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses; the Fallacy of the 'Pretext Plus' Rule in Employment Caes, 43 Hst. L.J. 57 (1991)..... 19

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PETITION FOR A WRIT OF CERTIORARI

Kenneth D. Sandstad prays for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on October 28, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 309 F.3d 893 (5th Cir. 2002), and a copy is contained in the Appendix attached hereto. A copy of the memorandum order of the United States District Court for the Northern Division of Texas is contained in the Appendix attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on October 28, 2002. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of judgment.

STATUTE INVOLVED

The statute construed is the Age Discrimination in Employment Act (the ADEA), 29 U.S.C. § 623(a) which states: "It shall be unlawful for an employer—(1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age . . . ."

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Sandstad filed his ADEA Complaint and Jury Demand on October 14, 1999. In June 2001, the district court granted CBRE summary judgment and dismissed Sandstad's claims. Sandstad timely appealed to the United States Court of Appeals for the Fifth Circuit. Following oral argument, a three-judge panel of the Fifth Circuit affirmed the judgment of the district court.

The district court had jurisdiction over Sandstad's claims under the ADEA, 29 U.S.C. § 626(c) and 28 U.S.C. § 1331 (general federal question jurisdiction).

B. Factual Background

Sandstad was born on May 22, 1946. Sandstad began working for CBRE in July, 1974 as a sales manager in CBRE's Minneapolis/St. Paul office. In 1979 he became Vice President and Resident Manager of the Minneapolis/St.

Paul office. In 1984, CBRE promoted Sandstad to First Vice President and Resident Manager of the North Dallas office in Texas. In 1986, CBRE promoted Sandstad to South Central Regional Manager, Brokerage Services.

In 1990 Sandstad became Central Division Manager over Brokerage Services, reporting directly to the President of Brokerage Services, Gary Beban. Sandstad reported to Beban from 1990 until September 1997, except for a period of less than one year in late 1994 and part of 1995, when he reported to Dick Clotfelter as the National Focus Client Leader for Institutional Services. In late 1995, Clotfelter gave Sandstad a poor performance review.

In 1996, Sandstad returned to the Brokerage Services as the Eastern Division Manager, again reporting to Beban. As the Eastern Division Manager, Sandstad was responsible for about half the country, more than 1,400 employees, 47 offices, and 18 reporting managers. In 1998 Beban's successor, Brett White, President of Brokerage Services, reorganized the Brokerage Services Company from two divisions (Eastern and Western) to nine smaller regions. Sandstad became South Central Region Manager, responsible for the sales offices in Texas, Oklahoma, Arkansas, Louisiana and New Mexico.

Sandstad's rise in CBRE's management stopped soon after CBRE became a publicly traded company in 1996. As part of the process of going public, CBRE held an Initial Public Offering ("IPO") Roadshow during late October and early November 1996. Prior to the IPO, CBRE predicted potential investor and analyst concerns. CBRE anticipated that investors would be concerned that its management was too old and devised a plan to reduce the age of CBRE executive management—the Long-Term Leadership Orientation Program ("the Plan"). The Plan was expressly designed to replace older CBRE executives with younger persons.

CBRE's preparations were astute. During the Roadshow, Walter Stafford, CBRE's Senior Executive Vice President and General Counsel heard stock analysts express their concerns that there was "too much grey hair" among CBRE's senior managers. Stafford told other senior managers about these statements and stated that something would have to be done to remedy the analysts' perception.

In an October 1, 1996 memo, Didion stated the "Purpose" of the Plan was: "To identify and orient promising and committed young managers for long-term leadership roles within the Company." Didion considered the Plan to be very important, and it represented a major financial commitment to CBRE. Didion stated the Plan's intent in a memo of October 17, 1997:

> The objective [of the Plan] was, and is, to identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management positions over the next 5+ years, ultimately replacing current senior management.

CBRE instituted two sessions under the Plan. Didion was responsible for the first session, which began in late 1996. White, one of the "young" managers who participated in the first Plan session, was responsible for running the second session. Didion is the undisputed decisionmaker with respect to the promotion of the younger White (instead of Sandstad) to President of Brokerage Service. White is the decisionmaker on Sandstad's termination.

With the Plan in place, CBRE did reduce the age of its executive management. CBRE chose "younger" managers to participate in the Plan, and promoted several of them to senior management soon after their participation. In late 1996, CBRE chose 14 persons to participate in the first session. The average age of those 14 individuals was 38.8. As of September 1996, the average age of then existing senior

management was 54.8. CBRE chose twelve individuals to participate in the second session. The average age of that group was 40.6. The average age of CBRE's senior management team as of September 1997 was 52 years old. In 1998, the average age of senior management dropped to 48.75.

In 1997 Beban left his position as President of Brokerage Services. In July 1997, CBRE promoted White, then 37, to Beban's position instead of Sandstad, age 51. Sandstad was clearly better qualified for the position of President of Brokerage Services than White. As Eastern District Manager, Sandstad had performed many of the duties he would have performed as President, assisted Beban in making many decisions and per Beban had exhibited "oustandingly strong" performance throughout that time.

Immediately after Didion's decision to promote White, Sandstad talked to Beban in Chicago. Beban told Sandstad that Didion made the decision to "skip a generation" and promote White to President. Beban also told Sandstad that Didion never considered who was the best or the most qualified person for the position, that he never considered anyone else for the position, that White was not ready for the President position, and that it was decided that Sandstad and George Kallis, the Western Division Manager at the time, would stick around for eighteen months to three years to train White. CBRE's top management unabashedly referred to employees as "old" or "young." CEO Didion always referred to anyone under 50 as young and to anyone over 50 as old. General Counsel Stafford said to President White, "You young guys seldom get it right," and White replied, "You old guys don't always get it right."

About fourteen months later, on September 14, 1998 two in-house CBRE lawyers met with Sandstad in Dallas and told him he was being terminated. Sandstad's direct supervisor, White and Stafford, participated by telephone. CBRE

replaced 52 year old Sandstad with 42 year old Jeff Langdon. White made the final decision to terminate Sandstad. White based that decision, in large part, on Stafford's recommendation.

After Sandstad filed a claim of age discrimination against CBRE, CBRE's proffered reasons for terminating Sandstad were his management style and the risk created by his conduct toward a female manager who had reported to him, Nina Petty. Sandstad produced evidence that these stated reasons were false.

First, CBRE "changed" its reasons for terminating Sandstad. At the termination meeting, Company representatives told Sandstad that Petty's claims of gender discrimination were "considered in the decision but it was not the determining factor." On his Notice of Personnel Action (NOPA) form (before his ADEA claim), CBRE checked the box for "company policy conflict" as the reason for termination. Within a day or two following Sandstad's termination a CBRE representative told Petty that Petty's complaint of gender discrimination was not the cause of Sandstad's termination. Sandstad's interrogatories asked CBRE to state the "exact reason(s)" for Sandstad's termination. Nowhere in response did CBRE indicate it terminated Sandstad because of gender discrimination, or because he put the firm at "substantial legal risk." CBRE stated that it terminated Sandstad because of the way Sandstad treated "managers working in his organization, both women and men."

Second, CBRE essentially admitted Sandstand had a good, not bad, record with respect to proper treatment of female employees. While it is true that an agent of CBRE, a lawyer it hired to investigate Petty's complaint, states that some of Sandstad's actions concerning Petty were inappropriate and (without explaining how) placed CBRE at substantial risk of a jury verdict, this agent cleared Sandstad of any gender

discrimination toward Petty. After CBRE terminated Sandstad, Beban told Sandstad that no person among CBRE's senior management did more to promote and foster a positive environment for women than did Sandstad.

Third, Sandstad offered proof that CBRE tolerates sex discrimination by managers, even when "risk" goes to liability. In 1993, Martha Mogull asserted a claim against CBRE for gender discrimination. Mogull obtained a judgment against CBRE in New Jersey state court in late 1996 for approximately $9 million. None of the managers Mogull accused of having discriminated against her were ever disciplined in any way, much less terminated. Further, some of Langdon's reports (Langdon replaced Sandstad) leveled complaints of age discrimination against Langdon, but he was not terminated. As with Petty complaint about Sandstad, these were not "formal complaints." No complaints were filed with the EEOC.

Fourth, as to the subjective management style reason, Sandstad showed that young Langdon (his replacement) had more severe management performance issues than were allegedly the reason for Sandstad's termination, but he was promoted rather than fired. Also, Sandstad proffered evidence of a lengthy career replete with positive performance evaluations, promotions, and prestigious awards and showed that after his one negative evaluation in 1995, he was again promoted.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting certiorari. First, the Fifth Circuit definition of direct evidence requires confession evidence. The Fifth Circuit definition is at logical odds with the concept of direct evidence recognized in *Price Waterhouse v. Hopkins*, and conflicts with the preponderance

definition applied in other circuits.[1] Second, in *Sandstad* the Fifth Circuit made two rulings, both of which created a split in the circuits and directly departed from this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed2d 105, 151 (2000). The Fifth Circuit ruled that the term "disinterested witnesses" used by this Court in *Reeves* does not include managers or agents involved in the employment decision, and thereby created a split in the circuits. Next, the Fifth Circuit ruled that a district court may determine the credibility of an employer's explanation of a discharge, that the court does not defer to the jury.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION

Properly defining "direct evidence" in an employment discrimination case is important for two main reasons. First, direct evidence is one of two basic proof schemes[2] available

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[1] The Court has granted certiorari in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (petition for cert granted, January 10, 2003, Docket No. 02-679) where the Ninth Circuit ruled that direct evidence, under a substantial evidence or preponderence definition, is not required for a mixed motive jury instruction. *Costa* may decide the appropriate standards for lower courts to follow in making a direct evidence determination in mixed motive cases.

[2] The Eleventh Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293, fn. 8 (11th Cir. 1999) observed that a third method of proving discriminatory treatment, statistical proof of a pattern of discrimination, may be a separate and distinct method of proving discriminatory treatment. *Id.* at 1293, fn. 8. Both the district and appeals court in *Sandstad* dismissed as insignificant Petitioner's evidence that the Plan was in place with an express purpose of replacing older managers with younger managers and CBRE reduced the average age of its senior

to a plaintiff. As the Court explained in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed 2d 207, 256 (1981), after an employment discrimination claimant makes a *prima facie* case and the defendant meets its burden of production by presenting a legitimate, non-discriminatory reason, the plaintiff retains the burden of persuading the court that he "has been a victim of intentional discrimination." *Id.* The plaintiff "may succeed in this either *directly* by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (emphasis added)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1825-26 (1973). Thus, direct evidence obviates the need for a pretext analysis under *McDonnell Douglas*. The panel in *Sandstad* recognized this point, stating it would apply the *McDonnell Douglas* burden shifting analysis "[b]ecause Appellant's case consists of circumstantial evidence." *Sandstad*, 309 F.3d at 898. As explained by the Eleventh Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293:

> The importance of properly defining "direct evidence" arises from our repeated statements that when a plaintiff has direct evidence of illegal discrimination, he need not make use of the *McDonnell-Douglas* presumption, and conversely, when he does not have such evidence, he is required to rely on the *McDonnell-Douglas* presumption.

The second reason "direct evidence" has an important meaning in employment discrimination is that it may trigger or permit a burden shifting "mixed motive" jury instruction. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L.Ed. 2d

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management team (to which Sandstad belonged) from 54.8 in September 1996 to 48.75 in 1998. This is a remarkable feat, since without additions or subtractions from the senior management team, its average age would have gone from 54.8 to 56.8 in two years.

268 (1989), Justice O'Connor's concurring opinion would permit the use of the mixed motive test only when direct evidence is present. *Id.* at 109 S.Ct. 1775. In this scenario, the burden of persuasion itself may "shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision ... absent consideration of [the protected characteristic]." *Price Waterhouse, supra*, 109 S.Ct. at 1796 (O'Connor, concurring opinion). The Supreme Court has granted certiorari in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (Supreme Court Docket No. 02-679), where the Ninth Circuit ruled that *direct evidence is not required* for a mixed motive jury instruction. If the Court upholds the Ninth Circuit decision, the question of whether there is or is not "direct evidence" will no longer have importance with reference to jury instructions (the Ninth Circuit in *Costa*, holds that the parties are not compelled to invoke the *McDonnell-Douglas* presumption). However, the existence or lack of "direct evidence" will still play its pivotal role in determining whether the plaintiff may avoid summary judgment and submit his case to a jury with direct evidence or must proceed with the *McDonnell-Douglas* pretext proof scheme.

The circuits split as to the definition of "direct evidence." Some circuits require substantial evidence of discriminatory animus to constitute "direct evidence." The Eleventh Circuit in *Wright, supra*, 187 F.3d at 1293 holds:

> "[D]irect evidence," in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."

This is the "*preponderance definition*" of direct evidence. *Id.* at 1301. *Wright* contrasted the preponderance definition with the "*dictionary definition,*" which is "evidence, which if believed, proves the existence of a fact in issue without

inference or presumption." *Id.* at 1294. This was the definition in the Eleventh Circuit at the time of the *Wright* decision. The Eleventh Circuit noted the flaw in the dictionary definition:

> The only "eyewitness" to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic. Any other form of evidence requires at least one inference to reach the conclusion that the employer has impermissibly discriminated.

Id. at 1295 (footnote omitted).

The court in *Wright* also examined Eleventh Circuit precedent. It found that, while the majority of cases stated the dictionary definition of direct evidence, the courts were in practice using the preponderance definition. *Id.* at 1294-1300. "Regardless of the stated definitions of direct evidence in these cases, however, a look at the actual holdings of these cases reveals that they all rely on the preponderance definition." *Id.* at 1294.

This "preponderance definition" is consistent with logic and the use of the term "direct evidence" by Justice O'Connor in *Price Waterhouse.* In her concurring opinion, Justice O'CONNOR set out the "direct evidence" requirement as the necessary threshold for triggering mixed motives analysis. *Price Waterhouse,* 490 U.S. at 276 (O'Connor, J., concurring in judgement). Justice O'Connor stated that the plaintiff must produce "*direct evidence* that an illegitimate criterion was a *substantial factor* in the [employment] decision." *Id.* (Emphasis added.) Justice O'Connor, as well as the plurality of the Court, was concerned that employment discrimination

plaintiffs often cannot pinpoint discrimination as the precise cause of their injury, despite having shown that it played a significant role in the decisional process. Thus, the *Price Waterhouse* burden shifting paradigm was born. *Id.* at 273 (O'Connor, J., concurring opinion). While a dictionary definition of direct evidence effectively requires a confession by the decisionmaker, Justice O'Connor plainly recognized that direct evidence does not require a confession, or even evidence that prohibited discriminatory animus was the sole factor in the adverse employment action. After all, Justice O'Connor was writing about "mixed motive" cases. Thus, a definition that requires "proof of the fact of discriminatory animus without inference or presumption," the Fifth Circuit standard employed in *Sandstad* (309 F.3d at 897), goes far beyond the direct evidence required for a mixed motive instruction.

While the Fifth Circuit has long stated the dictionary definition, in actuality (before *Sandstad*) it has applied the preponderance definition.[3] Before *Sandstad* the Fifth Circuit has often found direct evidence where "no-inference, no-presumption" evidence was missing, where there was no

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[3] *Haun v. Ideal Industries,* Inc., 81 F.3d 541, 545-46 (5th Cir. 1996)(president's instruction to human resources department that he did not want to hire older workers is direct evidence of discriminatory termination of 51 year old plaintiff); *Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 327, 329 (5th Cir. 1994)(statement by male supervisor to female plaintiff that she "would never be worth as much as a man to the bank because she was a woman" is direct evidence of discrimination; statement is evidence of corporate culture that made gender a motivating factor in plaintiff's termination); *Brown v. East Mississippi Elec. Pwr. Ass'n*, 989 F.2d 858 (5th Cir. 1993)(routine use of racial slurs is direct evidence of discrimination); *Vaughn v. Texaco, Inc.*, 918 F.2d 517 (5th Cir. 1990)(race-based policy of avoiding confrontation with plaintiff, including counseling about work performance, is direct evidence of race discrimination).

admission by the decisionmaker to the effect of, "I fired the plaintiff because she/he was old/black/female."

Sandstad states the dictionary definition (309 F.3d at 897) and applies it where a "preponderance definition," particularly under the summary judgment guidelines set out in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), would have easily produced a "direct evidence" label requiring denial of the employer's summary judgment motion.

The *Sandstad* panel then discussed three of the four pieces of evidence Sandstad claimed to be direct, and found them to require an inference to be probative of CBRE's discriminatory animus in firing Sandstad, so not "direct." *Id.* at 897-98.[4] As to the "Long Term Leadership Development Plan," which called for the identification and promotion of younger managers to senior management over the next five plus years, "ultimately replacing senior management," the Fifth Circuit weighed the evidence and reasoned that to find the Plan is evidence of age-based animus relevant to Petitioner's termination "requires the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons." *Id.* at 897.

Second, the Fifth Circuit reasoned that "the remarks by stock analysts about 'too much grey hair' in Company management," "cannot demonstrate directly that Appellant was fired because of his age." *Id.* at 898. In a half truth, the

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[4] The Fifth Circuit failed to mention all the direct evidence in what Beban told Sandstad in 1997. It failed to mention that Beban told Sandstad that Didion (who picked White over Sandstad for President of Brokerage Services–and White later fired Sandstad) never considered who was the best or most qualified person for the position, that White was not ready for the President position, and that it was decided that Sandstad and the other (also "old") division manager would stick around for eighteen months to three years to train White.

Fifth Circuit stated these speakers "not only had no part in the decision to terminate Appellant, they were not even employed by the Company." True, they were not employees of by CBRE, but Stafford heard the comments and acted on them, telling other senior managers about the remarks, saying that something would have to be done to remedy the analysts' perception. The Fifth Circuit omits from its analysis[5] the fact that Stafford recommended firing Sandstad.

Third, the Fifth Circuit found that Beban's "skipping a generation" statement was not direct evidence for two reasons. The Fifth Circuit reasoned that Beban was not responsible for Sandstad's termination (ignoring the fact that Beban was quoting Didion, that Didion selected White over Sandstad who then fired Sandstad). Next the Fifth Circuit credited Beban's deposition testimony where he tried to explain away his "skip a generation" quote of Didion, implausibly alibiing that "generation" meant a level of management seniority, and was not a reference to age. *Id.*

The Fifth Circuit's use of the dictionary definition of direct evidence in *Sandstad* illustrates the importance of the question and the wisdom of the Eleventh Circuit's observation that "the general evidentiary rule in federal courts [is] that circumstantial and direct evidence are treated alike." *Wright*, *supra* at 1300. Petitioner respectfully submits that this Court should resolve the split in the circuits and foster the purposes of federal laws against employment discrimination by rejecting the dictionary definition of direct evidence employed by the Fifth Circuit in *Sandstad* and approving the preponderence definition and this reasoning of the Eleventh Circuit:

> If direct evidence were to mean only evidence that proves discrimination without presumption or inference,

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[5] The Fifth Circuit mentioned these facts in its discussion of background facts (*Id.* at 894).

> then we would have created a system in which a plaintiff would be denied the opportunity to recover for employment discrimination despite the fact that he could prove such discrimination by a preponderance of the (circumstantial) evidence.

Wright, supra at 1301.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND DEPARTURE FROM THIS COURT'S HOLDING IN *REEVES*.

This Court's landmark decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2997 (2000), unanimously reversed the Fifth Circuit Court of Appeals, ruling, "it is apparent that respondent was not entitled to judgment as a matter of law." *Id.* at 120 S.Ct. 2110. The Court in *Reeves* did not merely reject the "pretext-plus" special rule of the Fifth Circuit that "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 2108. The Court in *Reeves* also rejected the Fifth Circuit's approach under Rules 50 and 56, F.R.C.P., by ruling that in the judgment as a matter of law and summary judgment process[6] the court should review the record as a whole but may not make credibility determinations or weigh evidence and

> must disregard all evidence favorable to the moving party that the jury is not required to believe. *See Wright & Miller*, 299. That is, the court should give credence to the evidence favoring the non-movant as well as that

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[6] *Reeves* reiterates that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" 120 S.Ct. at 2110, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

> "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. *Id.* at 300.

Reeves, *supra*, at 2110. The Fifth Circuit in *Sandstad* gutted the plain meaning of two major holdings in *Reeves* and created a split where the Fifth Circuit and one Seventh Circuit panel conflict with every other circuit that has cited *Reeves* in a discrimination case.[7] *Sandstad* (309 F.3d at 898) holds that interested witnesses do not include managers or agents involved in the employment decision and that in indirect discrimination cases, the court (not leaving it to a jury) may determine the credibility of an employer's explanation of the discharge.

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[7] *Compare Sandstad*, 309 F.3d 893, 893; *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002); and *Malacara v. City of Madison*, 224 F.3d 727, 731-33 (7th Cir. 2000) (Circuit Judge Williams dissenting, citing *Reeves*, and noting "classic 'he said, she said'" situation where majority credits defendant's self-serving affidavits) *with Fester v. Farmer Bros. Co.*, 49 Fed. Appx. 785, 793 (10th Cir. 2002); *Mickle v. Morin*, 297 F.3d 114, 120 (2d Cir. 2002); *Armour v. The County of Beaver, Penn.*, 271 F.3d 417, 420 (3d Cir. 2001); *White v. Burlington Northern & Santa Fe Rwy. Co.*, 310 F.3d 443, 449 (6th Cir. 2002); *Equal Employment Opportunity Commission v. Board of Regents of the Univ. of Wisconsin System*, 288 F.3d 296, 301 (7th Cir. 2002); *Warren v. Prejean*, 301 F.3d 893, 903 (8th Cir. 2002); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1286-87 (9th Cir. 2001); *Swenson v. Potter*, 271 F.3d 1184, 1199 (9th Cir. 2001). *Cf. Wilcox v. State Farm Mutual Automobile Ins. Co.*, 253 F.3d 1069, 1070-71 (8th Cir. 2001)(expressing opinion that the Court in *Reeves* "was intimating that there are some cases in which uncontroverted testimony from an interested party could be given credence").

A. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that Managers or Agents Involved in the Employment Decision are not Interested Witnesses Creates a Split in the Circuits and a Departure from this Court's Holding in *Reeves*.

Besides creating a split in the circuits (between those that now disregard the testimony of interested witnesses and the Fifth Circuit and one panel of the Seventh Circuit who still consider interested testimony on summary judgment[8]) the Fifth Circuit's ruling in *Sandstad* that the term "interested witnesses" does not include managers or agents involved in the employment decision would render meaningless the Court's words. *Reeves* was an ADEA case. The ADEA prohibits age discrimination by employers (29 U.S.C. § 623(a)) and defines "employer" as

> A person engaged in an industry affecting commerce who has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year .... ADEA, 29 U.S.C. § 630(b).

The meaning of the Court's words in *Reeves* that permit a court reviewing the record as a whole to give credence to 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from *disinterested witnesses*' (*Reeves* at 2110) is driven by the sentence that comes just before it:

> Thus, although the court should review the record as a whole, it *must* disregard all evidence favorable to the moving party that the jury is not required to believe.

Id. (emphasis added). The jury is not required to believe testimony of an interested witness, and to define "interested

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[8] *See* fn. 7 *supra*.

witness" to exclude the managers and agents of the defendant who are "involved in the employment decision" means that, as a practical matter, there is no such thing as an "interested witness" for purposes of employment discrimination cases. In using the term "disinterested witnesses" in *Reeves*, the Court must have meant something. It could not have meant that a named individual defendant is an interested witness but a manager or agent of the defendant employer is not. After all, under the ADEA (the statute involved in *Reeves*) there is no such thing as a named individual defendant. Besides, this would make nonsense of the rule. After all, the rule is designed to keep a reviewing court from making credibility determinations, weighing the evidence, and drawing legitimate inferences from the facts because these "are jury functions, not those of a judge." *Reeves* at 120 S.Ct. 2110.

Four fact scenarios illustrate the meaning of the Court's words in *Reeves*, and the fact that the Fifth Circuit decision stands that meaning on its head:

1. A manager gives an affidavit (or testifies at deposition) that age played no part in his firing decision, that he fired the plaintiff because the plaintiff stole company funds, that he saw the plaintiff take money from the cash register. There are no other witnesses (except the plaintiff, who denies it) and no corroborating evidence, such as an audit or marked money found in plaintiff's position.

2. The manager says he fired the plaintiff, not because of his age, but because he stole company funds. The employer has testimony from a disinterested witness, a customer who saw the plaintiff take money from the till.

3. The manager says he did not fire the plaintiff because of his age but because the plaintiff called

him an idiot. Plaintiff denies making the statement. There are no witnesses and no tape recording.

4. The manager says he did not fire the plaintiff because of his age, but because plaintiff called him an idiot. Non-supervisory co-workers provide affidavits that they heard this statement by the plaintiff. Plaintiff denies making the statement.

Per *Reeves*, in all the examples the testimony of the interested witness, the manager, may not be considered. In examples 2 and 4, the reviewing court may consider the testimony of disinterested witnesses. The Fifth Circuit in *Sandstad* and a Seventh Circuit panel authorize judges to decide who is telling the truth, the manager or the plaintiff in all four scenarios. As a practical matter, where the Fifth and Seventh Circuit created their special rule to keep open "the possibility of summary judgment *for employers*," a judge probably grants summary judgment in all four scenarios. *Sandstad*, 309 F.3d at 898 (emphasis added), *citing Traylor v. Brown*, 295 F.3d 783 (7th Cir. 2002). *See generally*, Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses; the Fallacy of the 'Pretext Plus' Rule in Employment Caes, 43 Hst. L.J. 57 (1991).

The Fifth Circuit in *Sandstad* disguises its rejection of the holding in *Reeves* by stating, "Appellant contends that *Reeves* requires us to disregard an interested witness testimony, all testimony by managers involved in the employment decision." *Sandstad*, 309 F.3d at 898. The Fifth Circuit states that it disagrees "with Appellant's interpretation of *Reeves*." *Id.* In fact the panel's disagreement is with this Court, since Sandstad merely pointed out to the Fifth Circuit the unequivocal language of *Reeves*. The Fifth Circuit in *Sandstad* did not suggest anyone who could possibly be an "interested witness," in an employment discrimination case if the managers involved in the employment decision do not fit this definition.

By eliminating managers involved in the employment decision from the definition of "interested witnesses," the Fifth Circuit in *Sandstad* did not merely depart from *Reeves*, it joined with the Seventh Circuit in stating its policy reasons for empowering judges to make credibility determinations of a defendant's explanation of the discharge at issue. The Fifth Circuit in *Sandstad* approvingly quoted another Seventh Circuit decision:

> As the Seventh Circuit noted in *Traylor v. Brown, et al.*, 295 F.3d 783 (7th Cir. 2002) to [hold that the definition of an interested witness can be so broad as to require a court to disregard testimony from a company's agents regarding the company's reasons for discharging an employee] would foreclose the possibility of summary judgment *for employers*, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken.

Sandstad, 309 F.3d at 898 (emphasis added). The candid announcement that the Fifth Circuit (and the Seventh Circuit) want to make credibility determinations to safeguard the possibility of summary judgment for employers is (1) no basis for defying an express holding of this Court and (2) flawed reasoning. The reasoning is flawed as shown by the four fact scenarios above. Specifically, employers certainly may, in appropriate cases, still obtain summary judgment when the courts follow *Reeves* as written. Further, *Reeves* was right on policy grounds. Summary judgment under Rule 56 does not play favorites, regardless of the identities of the movant and the non-movant. Certain rules apply and there is no room for a special class of summary judgment to facilitate summary judgment for employers in employment discrimination cases.

B. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that in Indirect Discrimination Cases, the District Court May Determine the Credibility of an Employer's Explanation of the Discharge Creates a Split in the Circuits and is Contrary to this Court's Holding in *Reeves*.

Writing in the context of a circumstantial evidence (pretext analysis) employment discrimination case, *Reeves* states flatly:

> Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

In *Sandstad*, the Fifth Circuit disagrees, citing as its authority the Seventh Circuit case of *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994). *Sandstad*, 309 F.3d at 898. The full quote from *Futrell* cannot fit side by side with *Reeves*. *Futrell* states:

> We note that in reviewing the sufficiency of the evidence in indirect discrimination cases, *we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue simply because juries have the right to judge credibility.* [citing *Perfetti v. First National Bank of Chicago*, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992).] If the evidence does not amply support a plaintiff's claim that the defendant's explanation is unworthy of credence, judgment as a matter of law is entirely appropriate.

Futrell, *supra*, 38 F.3d at 346.

This splits the circuits.[9] Moreover, it is a gigantic stretch from the non-movant having the burden to produce evidence

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[9] *See* fn. 7, *supra*.

that amply supports his claim, with the Court free to make credibility decisions concerning a defendant's explanation (*Futrell*, 38 F.3d at 346, endorsed by the Fifth Circuit in *Sandstad*, 309 F.3d 898), to *Reeves*, an indirect discrimination case. *Reeves* cautioned that while a court should review all the evidence in the record, it "must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 120 S.Ct. at 2110. This Court should grant certiorari to resolve the split in the Circuit and to insure that *Reeves* is still good law in the Fifth Circuit.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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